

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DANIEL SPOOR)	
Claimant)	
VS.)	
)	
RUBBERMAID SPECIALTY PRODUCTS)	Docket No. 231,254
Respondent,)	
Self-Insured)	

ORDER

Claimant appealed the March 17, 2000 Award entered by Administrative Law Judge Nelsonna Potts Barnes. The Appeals Board heard oral argument in Wichita, Kansas, on August 11, 2000.

APPEARANCES

Joseph Seiwert of Wichita, Kansas, appeared for claimant. Terry J. Torline of Wichita, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.¹ Additionally, at oral argument before the Appeals Board, the parties agreed that the transcript from the April 17, 1998 settlement hearing, along with the attached documents and medical reports, should be considered as part of the evidentiary record in this proceeding.

But the parties did not stipulate to Dr. Pedro A. Murati's October 12, 1999 letter to Joseph Seiwert, which was attached to respondent's submission letter. Therefore, that letter is not part of the evidentiary record.

¹ The Award indicates that respondent paid \$3,198.08 in medical expense in this claim but does not mention the payment of any temporary total disability benefits. But claimant's submission letter to the Judge indicates that respondent paid \$775.41 in temporary total disability benefits and \$3,198.08 in medical benefits in this claim. Respondent's submission letter indicates that it paid \$775.41 in temporary total disability benefits and \$3,772.58 in medical benefits, but that those payments were made in a different claim, Docket #222,451, which was a claim for a March 5, 1997 accident.

ISSUES

This is a claim for a February 15, 1998 accident and left wrist injury. Judge Barnes found that claimant sustained an accident on the date alleged but failed to prove that he sustained either permanent impairment or disability from that accident. The Judge then entered an award denying all compensation.

Claimant contends the Judge erred. Claimant argues that the Appeals Board should accept Dr. Pedro A. Murati's opinions and award him benefits for a 13.25 percent permanent partial disability to the left forearm. Claimant argues that the February 1998 accident increased the functional impairment in the left forearm from 6.75 percent to 20 percent.

Conversely, respondent contends that claimant failed to prove that he sustained personal injury on the date alleged and failed to prove that he sustained any permanent impairment as a result of the alleged accident.

The only issues before the Appeals Board on this review are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent on February 15, 1998?
2. If so, what is the nature and extent of claimant's injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds:

1. On February 15, 1998, while pulling plastic from a mold claimant felt a popping sensation in his left wrist and a shooting pain in the back of his left hand and up into his arm. The incident occurred while claimant was working for respondent.
2. Claimant had a history of left wrist injury before the February 1998 incident. Approximately 10 years ago or more, claimant had a left carpal tunnel release. In March 1997, claimant had accidentally cut his left wrist with a utility knife lacerating the extensor pollicis longus tendon and an adjacent nerve. Following the initial tendon repair surgery in March 1997, claimant developed scar tissue around the tendon and the superficial radial nerve. In September 1997, Dr. Bernard F. Hearon, an orthopedic surgeon, performed a second surgery to explore the tendon and to free the superficial radial nerve, which was found to be trapped in scar tissue.
3. After the second surgery, Dr. Hearon determined that claimant had a one percent functional impairment to the left upper extremity. Dr. Hearon did not see claimant again until February 20, 1998, five days after the incident at work. At that time, claimant told the

doctor about the incident at work and the increased symptoms that he was having. Dr. Hearon testified, in part:

Q. (Mr. Wooding) What were his [claimant's] complaints at that time?

A. (Dr. Hearon) He presented for evaluation of a new injury to the left wrist which occurred at work on 15 February, '98 as he was lifting an ice chest out of a mold. This was five days prior to my seeing him in the office. He stated he heard a loud -- strike that. He stated he heard a pop in the wrist and had immediate pain and swelling of the wrist. He again complained of numbness and tingling on the back or dorsum of the left index finger and in the web space between the index finger and the thumb. This latter complaint was felt to be reflective of the previous nerve injury. But it was not clear if he had sustained a significant new injury to the wrist. And accordingly, I did a complete evaluation of the patient in terms of physical examination which was really a rather benign examination except for some loss of wrist volar flexion, there was no evidence of swelling and no evidence of bruising and radiographs of the left wrist revealed no significant abnormality.²

After examining claimant, the doctor determined that claimant had a mild left wrist strain or sprain.

4. Claimant returned to Dr. Hearon two months later in April 1998. At that time, the doctor believed claimant was experiencing pain localized to the previous operative site and pain in the distribution of the superficial radial nerve. The doctor's impression was that claimant's symptoms were related to the initial injury that he had sustained to the superficial radial nerve. Dr. Hearon and claimant discussed treatment options, which included surgically exploring and either freeing or resecting the nerve.

5. In August 1998, after considering the treatment options, claimant returned to Dr. Hearon requesting surgery. In late September 1998, the doctor operated on claimant's left wrist. In that surgery, the doctor harvested a vein and wrapped it around the injured superficial radial nerve to buffer it from external force and to prevent further scarring. At the October 1998 follow-up visit, claimant reported that his radiating-type pain had improved and the doctor determined that claimant's range of wrist motion had improved to the normal range.

6. According to Dr. Hearon, claimant did not sustain any impairment of function as a result of the February 1998 incident. The doctor testified:

² Deposition of Dr. Bernard F. Hearon, January 7, 2000; pp. 7, 8.

Well, I think that that injury [the February 15, 1998 incident] was a red herring in all of this. As I have already stated in this deposition, when he [claimant] presented to the office on that occasion indicating to me that he had sustained what to him was a significant injury, he was given the benefit of the doubt even in the face of a benign physical examination. When he then came back and saw me a second time in April, it was clear to me that his ongoing complaints with the left wrist were simply an extension of what had gone before, i.e., the initial injury from March of '97. So to answer your question, I do not consider the interval injury a significant injury at all and I would attribute no impairment at all to that injury.³

Dr. Hearon believes that claimant's functional impairment to the left upper extremity remained at one percent despite the third surgery to the left wrist. The record does not indicate whether or not the doctor used the fourth edition of the *AMA Guides to the Evaluation of Permanent Impairment* (the *Guides*) in formulating that rating.

7. Claimant's attorney arranged for claimant to be evaluated by Dr. Pedro A. Murati, who examined claimant on April 14, 1999, and issued a medical report dated the same day. For some unknown reason, claimant told Dr. Murati about the March 1997 laceration but did not mention the February 1998 incident at work. In the April 14, 1999 medical report, the doctor rated claimant's left upper extremity impairment at 20 percent using the *Guides*.

At the doctor's deposition, Dr. Murati was asked to assume that claimant felt a sudden onset of pain and burning sensation on February 15, 1998, and that he later had left wrist surgery. Further, the doctor was asked to assume that sometime before the third wrist surgery claimant had settled an earlier left wrist injury claim based upon a 6.75 percent functional impairment to the left upper extremity. Assuming those facts, the doctor testified that 13.25 percent of claimant's functional impairment to the left upper extremity was attributable to the February 1998 incident. The doctor testified, in part:⁴

Q. (Mr. Seiwert) And, Doctor, assuming the scenario that I provided you with before beginning this deposition, that claimant reported having an additional accident on February 15th, 1998, how much of the permanent impairment rating that you provided to the claimant on page 3 of your report would have been preexisting?

MR. TORLINE: Object. It calls for speculation. There's a lack of foundation. You may answer if you can.

³ Deposition of Dr. Bernard F. Hearon, January 7, 2000; p. 15.

⁴ Deposition of Dr. Pedro A. Murati, September 15, 1999; pp. 9, 10.

A. (Dr. Murati) Well, I understand that there was a 6.75 impairment settlement before the third surgery. Am I correct?

Q. That's correct.

A. Well, just subtract that from my rating, and whatever's left would be due to the last surgery.

Q. So that would be 13.25 percent?

A. Yes.

Q. So if, assuming correctly, as I told you --

A. Yeah.

Q. -- that the claimant reported an additional onset on February 15th, 1998, would the 13.25 percent be attributable to that injury?

A. Yes.

MR. TORLINE: Same -- well, same objection I had before.

A. Yes.

Later in his testimony, the doctor considered the combined values charts contained in the *Guides* and changed his opinion as to the impairment that claimant sustained as a result of the February 1998 accident. The doctor's final opinion was that claimant sustained a 14 percent functional impairment to the left upper extremity as a result of the February 15, 1998 incident.⁵ The doctor acknowledged that his functional impairment opinion was premised on the assumptions that claimant sustained additional injury in February 1998, and that all the functional impairment that exceeded 6.75 percent to the left upper extremity was caused by that incident.

8. Respondent had claimant evaluated by Dr. J. Mark Melhorn, an orthopedic surgeon. Dr. Melhorn examined claimant in November 1999 and, using the *Guides*, rated the functional impairment in claimant's left forearm at 12 percent. Considering claimant's past medical records and the fact that in October 1997 Dr. Lynn Ketchum rated claimant's left forearm at 12.5 percent, Dr. Melhorn does not believe that claimant sustained any additional impairment as a result of the February 1998 incident. According to Dr. Melhorn,

⁵ Deposition of Dr. Pedro A. Murati, September 15, 1999; p. 24.

who specializes in hand and upper extremity injuries, it is not uncommon for patients with radial nerve injuries to require numerous surgeries to attempt to relieve their symptoms.

9. The Appeals Board finds that claimant has failed to prove that he has sustained additional functional impairment as a result of the February 15, 1998 incident. That conclusion is based upon the testimonies of Doctors Hearon and Melhorn and Dr. Ketchum's opinions regarding functional impairment. The Board has carefully considered Dr. Murati's opinions but finds that they are entitled less weight as he was initially unaware of the February 1998 incident and not completely versed regarding claimant's medical history and previous functional impairment ratings.

The Board finds that it is more probably true than not that the February 1998 incident only temporarily aggravated the left wrist. Additionally, it is more probably true than not that the September 1998 surgery was not related to the February 1998 incident but, instead, the natural consequence of the March 1997 accident. As revealed by Dr. Melhorn, it is not uncommon for patients with radial nerve injuries (the March 1997 injury) to require as many as four or five surgeries.

CONCLUSIONS OF LAW

1. The Appeals Board finds and concludes that claimant sustained personal injury by accident arising out of and in the course of employment with respondent on February 15, 1998. Although the injury sustained in that incident resolved, the Award should be modified to grant claimant the reasonable and necessary medical expense incurred in treating that temporary aggravation. As indicated above, the Appeals Board specifically finds and concludes that the September 1998 surgery was not related to the February 1998 injury.

2. The Workers Compensation Act places the burden of proof on injured workers to establish their right to compensation.⁶ And that burden is to persuade the trier of facts by a preponderance of the credible evidence that their position on an issue is more probably true than not when considering the whole record.⁷

3. Because the evidence fails to establish that claimant sustained permanent injury or impairment as a result of the February 1998 incident, the request for permanent partial disability benefits must be denied.

4. The Appeals Board adopts the findings and conclusions set forth in the Award that are not inconsistent with the above.

⁶ K.S.A. 1999 Supp. 44-501(a).

⁷ K.S.A. 1999 Supp. 44-508(g).

AWARD

WHEREFORE, the Appeals Board finds that the March 17, 2000 Award should be modified to grant claimant the reasonable and necessary medical expenses incurred as a result of the February 15, 1998 incident.

The Appeals Board adopts the remaining orders in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph Seiwert, Wichita, KS
Terry J. Torline, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director